



Comptroller General  
of the United States

61576

Washington, D.C. 20548

**TED VERSION\***

## Decision

**Matter of:** ManTech Advanced Systems International, Inc.

**File:** B-255719.2

**Date:** May 11, 1994

David W. Burgett, Esq., Daniel C. Sweeney, Esq., and James A. Hourihan, Esq., Hogan & Hartson, for the protester. Thomas J. Madden, Esq., John J. Pavlick, Jr., Esq., and Fernand A. Lavallee, Esq., Venable, Baetjer, Howard & Civiletti, for Raytheon Support Services Company, an interested party.

Craig E. Hodge, Esq., Dominick J. Brognano, Esq., Capt. Daniel Pangburn, Department of the Army, for the agency.

Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

Protest is sustained where the solicitation required offerors to provide resumes for all personnel it intended to use in contract performance and a competitor offered incumbent personnel for whom it misrepresented that it had employment commitments, and this misrepresentation materially influenced the agency's evaluation of the competitor's proposal in selecting it for award.

### DECISION

ManTech Advanced Systems International, Inc. protests the award of a contract to Raytheon Support Services Company under request for proposals (RFP) No. DAAB10-92-R-0084, issued by the U.S. Army Communications-Electronics Command for maintenance and engineering services. ManTech contends that Raytheon misrepresented the commitment of proposed personnel to work under the contract and proposed personnel whom Raytheon had no intention of using; that Raytheon's proposal did not satisfy the RFP's personnel qualification

\*The decision issued May 11, 1994, contained confidential or source selection sensitive information, and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions in text are indicated by "[deleted]"; names of individuals have been deleted and replaced by "[letters of the alphabet]."

requirements; that the Army misevaluated ManTech's proposed personnel; and that the Army misevaluated Raytheon's and ManTech's proposed costs.

We sustain the protest.

The RFP contemplated the award of an indefinite delivery/indefinite quantity contract under which fixed-price/cost-no-fee delivery orders would be issued for logistics, maintenance, quality assurance, and engineering services to support the Army's TROJAN electronic communications and reconnaissance system for a base period with 4 option years.<sup>1</sup> The offerors' direct contract labor was to be based upon fixed-price labor rates, while the remainder of the proposed contract costs, such as relocation, cost-of-living, travel, and training costs, would be on a cost-no-fee basis.

The RFP's statement of work (SOW) included technical, educational, experience, and security clearance requirements that contractor personnel must satisfy to perform the required technical support tasks. The RFP required offerors to submit resumes for the personnel in 67 specified positions at various locations outside the United States and at Vint Hill Farms, Virginia, and to "describe the availability of personnel with appropriate clearance and commitment to support all requirements of the [SOW]."<sup>2</sup> The RFP did not require the submission of letters of intent or employment commitments from proposed personnel, but offerors were informed that the "selection and assignment of cleared qualified personnel is a critical requirement of this solicitation," and that substitutions and changes in personnel could not be made without government concurrence.<sup>2</sup> Offerors were also required:

"to verify and insure the continuing availability of personnel for whom resumes are required and have been submitted. If any personnel substitutions/changes occur or are made prior to Best and Final Offer, the offeror shall immediately notify the [c]ontracting [o]fficer of such change(s) and amend its proposal accordingly. Failure to do so may render the proposal unacceptable."

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<sup>1</sup>The TROJAN system is described by the Army as "a highly advanced, technologically sophisticated, security sensitive, national level intelligence asset that is employed worldwide."

<sup>2</sup>All the designated personnel were apparently key in the context of this solicitation.

The RFP provided for award on a "best value" basis and stated the following evaluation factors and subfactors:<sup>3</sup>

Technical

1. Personnel
  - a. Resumes/Qualifications
  - b. Experience
  - c. Education
2. Clearance
3. Availability/Adaptability
4. Performance Plan
  - a. Maintenance support
  - b. Contractor logistics support
  - c. Configuration management
  - d. Quality assurance
  - e. Technical documentation

Management

Performance Risk

Cost

The technical evaluation factor was stated to be significantly more important than the management factor, and the management factor was stated to be slightly more important than performance risk. Total evaluated cost was stated to be equally as important as the total rating for all other evaluation factors combined.

The Army received offers from Raytheon and ManTech, the incumbent TROJAN contractor, by the closing date for receipt of proposals. Discussions were conducted with each offeror and best and final offers (BAFO) received. Both firms' BAFOs were evaluated as being [deleted] overall, with [deleted] performance risk.<sup>4</sup> Moreover, both offerors received [deleted]. Specifically, [deleted]. Raytheon's

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<sup>3</sup>The RFP also stated subfactors for the management and performance risk evaluation factors, which are not relevant to this protest.

<sup>4</sup>[Deleted].

<sup>5</sup>[Deleted].

BAFO was considered slightly better than ManTech's because of [deleted].

The firms' BAFO price/cost proposals were evaluated as follows:

	<u>Proposed</u>	<u>Adjusted</u>
Raytheon	\$13,802,421	[deleted]
ManTech	[deleted]	[deleted]

Award was made to Raytheon "as the lowest priced, technically acceptable offeror which represents a low risk to the [g]overnment."

This protest followed. Although the Army was notified of the protest within 10 calendar days of the date of award, the Army authorized performance of Raytheon's contract notwithstanding the protest, based upon the agency's determination that performance was in the government's best interest. See 4 C.F.R. § 21.4(b)(1) (1993).

ManTech protests that Raytheon misrepresented the availability and commitment of personnel proposed in its proposal. Specifically, ManTech complains that Raytheon proposed 15 ManTech employees and misrepresented that these incumbent employees had approved the use of their resumes in Raytheon's proposal and had agreed to work for Raytheon should it be awarded the contract. In support of this contention, ManTech has provided us with the affidavits of 12 of the incumbent employees proposed by Raytheon.<sup>6</sup> ManTech argues that this proposal misrepresentation materially affected the agency's evaluation that found that Raytheon's proposal and commitment of incumbent personnel was a proposal strength.

Raytheon denies that it made intentional misrepresentations in its proposal and contends that the incumbent personnel resumes contained in its proposal were freely given to Raytheon by the ManTech employees, who placed no restriction on Raytheon's use of the resumes.<sup>7</sup> In support of its arguments, Raytheon has provided us with 14 declarations

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<sup>6</sup>The statements submitted by ManTech are actually unsworn declarations made under penalty of perjury, which have the same force and effect as sworn declarations or affidavits. See 28 U.S.C. § 1746 (1988). For convenience, we will refer to ManTech's declarations under penalty of perjury as affidavits.

<sup>7</sup>The Army states that it has no information bearing upon whether Raytheon made misrepresentations.

or affidavits, including declarations from four of the incumbent employees who had earlier provided declarations for ManTech. Raytheon argues that it reasonably believed that the incumbent personnel it proposed would be available to work for Raytheon, and in fact Raytheon extended offers of employment, after award, to 12 of the 15 ManTech employees it proposed and currently 7 of the former ManTech employees Raytheon proposed are employed by Raytheon on this contract.

We are not unmindful of the difficulty faced by a nonincumbent contractor in securing a qualified work force sufficient to win an award. See CBIS Federal Inc., 71 Comp. Gen. 319 (1992), 92-1 CPD ¶ 308. Nevertheless, an offeror's misrepresentation concerning personnel that materially influences an agency's consideration of its proposal generally provides a basis for proposal rejection or termination of a contract award based upon the proposal. See CBIS Federal Inc., *supra* (misrepresentation of personnel availability); Informatica, Inc., 57 Comp. Gen. 217 (1978), 78-1 CPD ¶ 53 (awardee misrepresented its survey of the availability of incumbent's personnel); ManTech Field Eng'g Corp., B-245886.4, Mar. 27, 1992, 92-1 CPD ¶ 309, *aff'd*, B-245886.5, Aug. 7, 1992, 92-2 CPD ¶ 89 (misrepresentation of personnel availability); Planning Research Corp. v. United States, 971 F.2d 736 (Fed. Cir. 1992) (personnel misrepresentation). A misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the evaluation. Informatica, Inc., *supra*; Harris Corp.; PRC Inc., B-247440.5; B-247440.6, Aug. 13, 1992, 92-2 CPD ¶ 171.

We find from our review of the record that Raytheon misrepresented that it had employment commitments from the incumbent personnel it proposed. It also appears that Raytheon did not have the approval of some of the incumbent employees to use their resumes in the Raytheon proposal for this contract. While Raytheon argues that it did not represent "that it had obtained commitments from anyone

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<sup>2</sup> While some of the statements submitted by Raytheon are attested to under oath, for example, the statements of Raytheon employees, [A] and [B], the individuals responsible for preparing the proposal, the statements of the former ManTech employees and of another Raytheon employee, [C], are not attested to under oath or, unlike those submitted by ManTech, subscribed by the declarant under penalty of perjury.

it proposed" in its proposal, this is plainly refuted by the record. For example, Raytheon made the following representations in its proposal:

"[Deleted]."<sup>9</sup> [Emphasis added.]

Raytheon's representations that it had obtained agreements from incumbent personnel to accept assignments and obtained Mr. [D]'s agreement to work for Raytheon can only be construed as representations of employment commitments or agreements of intent to accept employment. In this regard, the Army's evaluators, in citing Raytheon's offer of incumbent personnel as a proposal strength, read Raytheon's proposal as stating that it had employment commitments from the incumbent personnel:

"[Raytheon] has identified and received commitments from 15 personnel currently working for the incumbent contractor. The incumbent personnel . . . are in critical work areas and would make a significant difference during contractor transition."

Raytheon also represented that it had received approval to use the resumes of the incumbent personnel in its proposal for the TROJAN contract. Specifically, Raytheon stated in its proposal:

"[Deleted]" [Emphasis added.]

As noted above, ManTech and Raytheon have provided us with numerous affidavits and statements as to Raytheon's use of the incumbent personnel resumes. Raytheon has also provided us with statements of several Raytheon employees and agents that were involved in recruiting personnel for the TROJAN procurement. None of these statements state that Raytheon had agreements or commitments from the incumbent personnel to work for Raytheon on the TROJAN work.<sup>10</sup> ManTech, however, has provided us with affidavits, a number of which are uncontroverted, which show that Raytheon did not have

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<sup>9</sup>[Deleted].

<sup>10</sup>While Raytheon argues that it had a reasonable basis to believe that the incumbent personnel would be available to work for Raytheon should it win the award because these individuals had given their resumes to Raytheon representatives, this does not address the fact that Raytheon represented more than such a belief in its proposal by stating that it had agreements and employment commitments from the incumbent personnel whose resumes it submitted.

agreements or employment commitments from several persons and which indicate that Raytheon did not have these persons' approval to use their resumes in Raytheon's proposal.

For example, Mr. [D]'s affidavit, which was provided on ManTech's behalf, states that prior to the closing date for receipt of proposals under the RFP he provided his resume to Mr. [C], a Raytheon employee, to explore the availability of research and development positions within Raytheon; at this meeting, he was informed by Mr. [C] that "Raytheon was not planning to bid for the TROJAN II contract." Mr. [D] further states that:

"Shortly after the meeting at the Hampton Inn, [C] telephoned me at my home and asked if I would consent to Raytheon's use of my name and resume in a Raytheon proposal for the TROJAN II contract. I unequivocally refused his request and told him that I would not give such authorization to Raytheon."

Despite Mr. [D]'s express denial of permission to use his resume in the TROJAN proposal, Raytheon proposed Mr. [D] as one of its required [deleted] and stated that "Mr. [D] has agreed to work for Raytheon if we are the successful bidder for the TROJAN support contract."

Raytheon contends that it was unaware that Mr. [D] had placed any restrictions on the use of his resume and that it could have proposed a different [deleted] if Mr. [D] were unavailable. Raytheon challenges the veracity of Mr. [D]'s affidavit, arguing that the affidavit may have been the result of pressure by ManTech.<sup>11</sup>

The record does not support Raytheon's contentions. While Mr. [D] accepted a position with Raytheon after Raytheon began performance of the contract and subsequently provided a statement on Raytheon's behalf, Mr. [D] does not contradict his earlier affidavit by asserting that he either did provide permission to Raytheon to use his resume or entered an agreement to accept employment from Raytheon. Mr. [D] also does not assert that his earlier statement is inaccurate in any regard or was the result of pressure or duress from ManTech.<sup>12</sup> Moreover, Raytheon has provided a

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<sup>11</sup>Despite being solicited, neither Raytheon or ManTech wanted a hearing in this protest.

<sup>12</sup>Raytheon's statements from other former ManTech employees that contend that Mr. [D]'s affidavit was the result of ManTech pressure or that Mr. [D] may have lied are not

(continued...)

statement from Mr. [C], who does not directly challenge Mr. [D]'s affidavit, but only states that he does "not remember Mr. [D] ever telling me not to use his resume in our proposal."<sup>12</sup> In any event, Mr. [C] does not assert that Raytheon received any agreement from Mr. [D] to work for Raytheon if Raytheon won the TROJAN contract or to accept an assignment in that event. We conclude that Raytheon did not have Mr. [D]'s authorization to use his resume or agreement to work for Raytheon in the event Raytheon was awarded this contract.

The affidavit of ManTech employee [E] also suggests that Raytheon's proposal contained material misrepresentations. Mr. [E]'s affidavit states that he denied Raytheon permission to use his resume. Specifically, Mr. [E], who Raytheon proposed as a [deleted], states that while he was stationed in [deleted] for ManTech, a Raytheon representative contacted the [deleted] office and requested to see resumes. Although Mr. [E] was away at that time, his wife provided Raytheon with a copy of his resume. Mr. [E] further states:

"Approximately a week or two later, a Raytheon representative called the work site. I was told that Raytheon would pay us about [deleted] per hour. I unequivocally stated that I would not work for Raytheon under such conditions. Neither in this conversation nor at any other time did Raytheon ask to use my resume in a proposal, and I never gave such permission."

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<sup>12</sup>(...continued)

persuasive, inasmuch as Mr. [D] is now employed by Raytheon and provided a statement on Raytheon's behalf which does not assert that his earlier affidavit is inaccurate or the result of duress. For this same reason, we do not find persuasive the Army's arguments based upon the same hearsay statements.

<sup>13</sup>Mr. [C] asserts that he informed the incumbent personnel that he interviewed that Raytheon did not intend to submit an offer for the TROJAN work unless a Service Contract Act wage determination was included. None of the incumbent personnel's affidavits or statements, submitted by either ManTech or Raytheon, corroborates Mr. [C]'s statement; rather, these statements consistently evidence that Mr. [C] informed the incumbent personnel he interviewed that Raytheon did not plan to bid this contract. Thus, we give little weight to Mr. [C]'s statement.



Raytheon disputes Mr. [E]'s affidavit statement that he did not provide a copy of his resume to Raytheon. Specifically, Raytheon has provided us with the affidavit of Mr. [A], who states that Mr. [E] initially sent a partial resume to Raytheon from [deleted] and then directed his wife to send a complete resume from the United States. Mr. [A], however, does not dispute Mr. [E]'s statement that he informed Raytheon that he would not work for Raytheon under the terms presented; nor does Mr. [A] assert that Raytheon had obtained any agreements or employment commitments from Mr. [E].

ManTech also provided the affidavit of former ManTech employee [F], whom Raytheon proposed as a [deleted]. Mr. [F] states that he provided a year-old resume to Mr. [C] in January 1993, and that at that time Mr. [C] informed him "that Raytheon was not planning to submit a proposal to the [g]overnment for the TROJAN II contract. He explained the potential job opportunities at Raytheon (not including TROJAN II) in the vicinity as well as overseas positions." Mr. [F] states that in March or April 1993 (after Raytheon had submitted its initial proposal), and twice more in July and in September, Mr. [C] asked that Mr. [F] provide an updated resume; that he never provided an up-dated resume; and that he did not give Raytheon authorization to use his resume in any proposal, including that for the TROJAN contract.

After Raytheon began performance of the contract, Mr. [F] accepted a position with Raytheon. Raytheon subsequently provided us with a statement from Mr. [F] on Raytheon's behalf. While Mr. [F] sought to clarify his earlier affidavit, he does not dispute that he was informed that Raytheon was not going to submit a proposal for the TROJAN contract. Thus, it appears that Mr. [F] did not authorize Raytheon's use of his resume in this proposal. More importantly, Mr. [F] does not assert that he made any agreements to accept employment or assignments from Raytheon in the event that firm won the contract.

Another ManTech employee, [G], whom Raytheon proposed as a [deleted] in Germany, stated in an affidavit that he did not provide a resume or application to Raytheon. Mr. [G] states that "[a]t no time was I asked whether my resume could be used in a Raytheon proposal of any kind. I was not interested in working for Raytheon and would have said so if asked."

Raytheon has provided us with the statement of [H], ManTech's former site manager for the TROJAN work in Germany, who while a ManTech employee served as Raytheon's agent to solicit and obtain resumes from ManTech

employees.<sup>14</sup> Mr. [H] asserts that he "specifically remember[s] talking to Mr. [G] . . . and receiving permission from him to send his resume to Raytheon." While Mr. [H] disputes Mr. [G]'s statements, he does not contend that Raytheon received any employment commitments or agreements from Mr. [G].

Thus, we find that Raytheon misrepresented in its proposal that it had received employment commitments from the incumbent personnel it proposed. See CBIS Federal Inc., supra; ManTech Field Eng'g Corp.--Recon., supra. It also appears that at least for some of the proposed incumbent personnel, Raytheon did not have permission to use their resumes in this proposal. While Raytheon argues that the writers of its proposal did not know that Raytheon did not have the approval of the incumbent personnel to use their resumes or to represent employment commitments from them and that it obtained the resumes in the normal course of business, an offeror has an obligation to ensure the accuracy of its proposal representations. *Id.*

The Army and Raytheon argue that Raytheon's proposal misrepresentations were not material to the agency's evaluation. As noted above, a misrepresentation is material where an agency has relied upon the misrepresentation and that misrepresentation likely had a significant impact on the evaluation. Informatics, Inc., supra; Harris Corp.; PRC Inc., supra. Here, the record shows that Raytheon's misrepresentations were relied upon by the Army and likely had a significant impact on the evaluation, such that, in the absence of the misrepresentations, ManTech would have a reasonable possibility of being selected for award.

Specifically, the Army's contemporaneous evaluation documents establish that the agency considered Raytheon's offer of committed incumbent personnel to be a proposal strength.<sup>15</sup> For example, the agency's source selection evaluation board found:

"[Deleted]." [Emphasis added.]

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<sup>14</sup>Mr. [H]'s employment with ManTech was subsequently terminated.

<sup>15</sup>During the protest, Raytheon asserted that it monitored the availability of the ManTech employees in Germany during the contract competition through a third party [I]; Raytheon has not provided a statement from this individual.

<sup>16</sup>Raytheon itself states that it viewed "[t]he use of incumbents as a strength in Raytheon's proposal."

Raytheon's offer of incumbent personnel was also considered in the Army's cost realism evaluation of Raytheon's proposal. Specifically, in determining to apply the same estimated training cost for both offerors, the agency concluded that:

"[Deleted]."

In this regard, Raytheon touted the cost benefits inherent in its offer of incumbent personnel:

"[Deleted]."

Raytheon argues that any representations regarding the existence of employment commitments from the incumbent personnel are immaterial because the RFP did not require letters of commitment from proposed personnel. While it is true that the RFP did not require letters of commitment, but only that the personnel be available, it does not follow, as Raytheon suggests, that a misrepresentation that such commitments had been obtained would be immaterial. The fact is that the Army saw the offer and commitment of incumbent personnel as a proposal strength, and provided Raytheon with evaluation credit for having incumbent employee commitments beyond a recognition that these employees may be available.

The agency relied upon Raytheon's proposal misrepresentations in the evaluation and award selection. As indicated above, this was an extremely close competition between ManTech and Raytheon. Both firms' technical BAFOs were evaluated as being [deleted] overall, and the difference between the firms' evaluated cost/price amounted to only \$[deleted] of the more than \$[deleted] million of evaluated cost/price. While the source selection official selected Raytheon for award "as the lowest priced technically acceptable offeror," the single technical discriminator between the proposals, identified by the agency in its report on the protest, is that [deleted].<sup>18</sup> This is significant because, as outlined above, Raytheon was credited for 15 incumbent personnel. Moreover, the Army in its cost evaluation relied upon Raytheon's offer of

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<sup>17</sup>In its comments on the protest, Raytheon stated that "[t]he use of incumbents potentially represents a savings to the Army because some inter-[site] and intra-site travel, training, and recruitment costs, which were cost reimbursable under the contract, could be reduced."

<sup>18</sup>Based upon our review of the record, we find reasonable the agency's evaluation of ManTech's and Raytheon's proposed personnel, apart from Raytheon's misrepresentations.

incumbent personnel.<sup>19</sup> Given the closeness of the competition between ManTech and Raytheon, we believe that the misrepresentations had a significant impact on the evaluation and award selection.<sup>20</sup> See Informatica, Inc., supra.

The Army and Raytheon argue that ManTech was not prejudiced by Raytheon's misrepresentations in its proposal. Specifically, they argue that ManTech itself represented to the government that it had firm commitments from its own employees and could "guarantee their immediate availability" to work on the TROJAN contract, when ManTech had not specifically asked its employees whether they would continue in their employment on this contract. Finally, Raytheon asserts that it has hired or attempted to hire most of the incumbent personnel it proposed, such that no "bait-and-switch" occurred.

The Army's and Raytheon's arguments do not provide any basis for finding that ManTech was not prejudiced by Raytheon's misrepresentations. First, ManTech's representations that it had "firm commitments" from its own employees who would be "immediately available" were not false. The personnel proposed by ManTech were its own employees serving in the positions for which they were offered; thus, we fail to understand how ManTech's employment agreements with its employees would not constitute "firm commitments" or provide the basis for its assertion that these employees would be "immediately available." See Laser Power Technologies, Inc., B-233369; B-233369.2, Mar. 13, 1989, 89-1 CPD ¶ 267 (no requirement that offeror submit letters of commitment for its own employees).

Also, Raytheon's assertion that it has hired or attempted to hire the incumbent personnel it proposed does not provide any basis to find that ManTech was not prejudiced. The record establishes that Raytheon's statements were untrue at the time they were made, and the fact that Raytheon later attempted to hire the incumbent personnel does not make the

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<sup>19</sup>We are unable to calculate the precise cost effect of Raytheon's misrepresentations. Given our recommendation to recompute these requirements, we do not address ManTech's protest of the agency's cost evaluation.

<sup>20</sup>Raytheon also suggests that it could have received the same technical score by proposing personnel other than the incumbent personnel. We will not speculate as to how Raytheon's proposal would have been evaluated in the absence of the incumbent personnel it misrepresented. See Informatica, Inc., supra.

statements true after the fact. See Informatics, Inc., supra ("it is also inappropriate to take note of [the awardee's] post-selection efforts in regard to recruitment of [the incumbent's] employees"). We are aware that the reality in the current government contract market is that incumbent personnel to a large degree follow the award of contracts. Nevertheless, an offeror may not represent the commitment of incumbent employees based only on a hope or belief that the offeror will ultimately be able to make good its representation.

In sum, we find that Raytheon made misrepresentations that materially influenced the agency's evaluation of its proposal. We recommend that the Army recompute its requirements for the TROJAN electronic communications and reconnaissance system and, if a firm other than Raytheon is selected for award, terminate Raytheon's contract for the convenience of the government and make award to that firm, if otherwise eligible. In addition, we find that since a substantial portion of the contract has been performed, ManTech is entitled to its costs of proposal preparation. 4 C.F.R. § 21.6(d)(2). We also find that ManTech is entitled to its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1). ManTech should submit its certified claim for its costs directly to the agency within 60 working days of receipt of this decision. 4 C.F.R. § 21.6(f)(1).

The protest is sustained.<sup>21</sup>

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<sup>21</sup>ManTech has raised a number of other technical evaluation challenges to the agency's award selection, s.g., that Raytheon's proposal was based upon a "bait-and-switch." We have reviewed the record and find that these other allegations provide no basis to object to the award decision.